No. 10393.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KENNETH BENJAMIN EDWARDS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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Jurisdictional Statement.

This is an appeal from a judgment of convictions of the appellant by the District Court for the Southern District of Califora, and a jury thereof. This court has jurisdiction under the provisions of 28 United States Code, Section 225, subdivision (a), First and Third and subdivision (d).

Statement of the Case.

The appellant, one of the Jehovah's Witnesses, was convicted in the court below for a violation of the Selective Training and Service Act under an indictment [R. 2] which charged him with having "knowingly, wilfully, unlawfully and feloniously" failed to comply with an order of his local draft board.

In the court below, and before the Selective Service Agencies, he claimed to be both a duly ordained and regular minister, and hence entitled to a classifiaction as such under the Selective Training and Service Law.

Before his local board he asserted that he was a "full timed ordained minister of Jehovah's Witnesses" [R. 23], and he submitted evidence to his board that he was a full time "Pioneer," devoting 150 hours a month to his work as a minister, besides serving in other capacities; that he devoted full time to the Lord's work. [R. 23.]

At the trial the appellant claimed that he had not received a fair hearing before his local board or the Selective Agencies. The trial court refused to permit evidence to this effect, and on its own motion stated in the presence of the jury, "I'm not going to permit that question to be answered. I am not going to have the jury pass on the question of whether it is a fair hearing. That is not their province. The only thing they have to determine is whether there was a violation and if it was wilful." [R. 25.]

The trial court refused evidence proffered by the appellant that the members of the appellant's local draft board were prejudiced against Jehovah's Witnesses. [R. 26-29.]

Requested instructions proffered by the appellant, were rejected by the trial court. To this rejection the appellant duly excepted. The instructions so refused are:

> "You are instructed that although under the Act, the decision as to what classification a particular registrant is to receive is left to the local board. this does not mean that a court of law does not have the power nor that you as a jury do not have the power to review a classification.

"This review is limited, however, to a determination by the jury of the facts, subject to the limitations to be indicated by the Court in later instructions, that constitute arbitrariness or capriciousness, denial by the draft board of a fair hearing, or violation by the draft board of the provisions of the Selective Training and Service Act, or the Rules and Regulations adopted pursuant to that Act."

"You are instructed that local and appeal boards under the Selective Service System must not act in an arbitrary or capricious manner. Classifications by such boards must be based upon the evidence befor them and that evidence alone.

"If you find that the local and appeal boards in this case acted in an arbitrary or capricious manner or disregarded the evidence that was before them or failed to give the registrant, defendant here, a full and fair hearing, you will acquit the defendant and find him not guilty.

"You are further instructed more particularly that if the order of the local or appeal boards in classifying the defendant was made arbitrarily or capriously, or was the result of passion or prejudice; or was made in disregard of the evidence presented to it, or if there was not substantial evidence to sustain the finding of the local board; or if the defendant was denied any hearing at all; or was denied a full and fair hearing, the order of the local or appeal board in ordering the defendant to report for induction into the armed forces was an illegal order since it was made as a result of the deprivation of the defendant of his rights of due process of law."

"It is for the jury to determine the facts as whether any of the above took place in the case of the defendant."

Similar instructions, along the same lines were also rejected by the trial court [R. 32-33].

Amongst other instructions given by the Court, and duly excepted to by the appellant were: "The only question you are called to determine is whether the law has been violated knowingly and wilfully." [R. 39.]

Question Involved.

May a defedant charged with a violation of the Selective Training and Service Act assert as a defense to a criminal prosecution for failure to comply with an order of a local draft board, that the order which he is charged with having violated was unlawful because it was arbitrary or capricious, without evidentiary support, or without a hearing.

Specification of Assigned Errors to Be Relied Upon.

1. The refusal of the trial court to permit any inquiry as to whether appellant had a fair hearing before the Selective Service Agencies. [R. 43.]

2. The refusal of the trial court to allow any inquiry as to whether the members of the appellant's local draft board were prejudiced against Jehovah's Witnesses.

3. The refusal of the trial court to give instructions requested by the appellant, to the effect that the appellant could assert as a defense that he had been denied a fair hearing by the Selective Service Agencies and that they had acted arbitrarily and capriciously and without any or substantial evidence in refusing to classify the appellant as a minister within the Selectrive Training and Service Act. [R. 43.]

ARGUMENT.

I.

Determinations of Local Selective Service Boards Are Subject to Judicial Review, if Such Decisions Abridge Due Process, Are Made Upon the Denial of a Fair Hearing, Are Unsupported by Evidence or Arbitrary or Capricious, or Violate Law.[1]

That order of local draft boards are subject to judicial review is a proposition supported by many cases;[2] and generally no longer challenged.

This rule of law puts life and reality into the well recognized judicial concept, so well expressed in *Jones v. Securities and Exchange Commission,* 298 U. S. 1, 23:

> ". . . Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish wherever they are brought into conflict. To borrow the words of Chief Justice Day—'There is no place in our constitutional system for the exercise of arbitrary power.'"

It is equally well put by Chief Justice Hughes in *Morgan v. United States,* 304 U. S. 1, who recognized that the

> "vast expansion of administrative agencies makes necessary that in administrative proceedings of a

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[1]The answer to this precise question is being awaited from the United States Supreme Court in *Falbo v. United States,* October Term 1943, No. 73.

[2]They are cited and considered in detail in *Okrand, Judicial Review of Selective Service Board Classifications,* Southern California Law Review, November, 1942.

Cf. also Yankwich, J., in *Ex parte Stewart,* 47 F. Supp. 410.

quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play."

At another point the Court observed:

"If these multiplying (administrative) agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

St. Joseph Stockyards v. United States, 298 U. S. 38, is in similar accord.

II.

The Selective Service System Is an Administrative and Quasi-Judicial System, and Therefore Is Governed by the Law Governing Judicial Review of Administrative or Quasi-Judicial Bodies.

In *Angelus v. Sullivan,* 246 Fed. 54, 63 (C. C. A. 2, 1917), speaking of the 1917 Draft Act, the Court said:

"The law courts have a general superintending control by certiorari over all inferior tribunals acting in a judicial or quasi-judicial character. Civil jurisdiction is not entirely taken away by the words of a statute which declares that the judgment of the inferior tribunal shall be final."

Again in *Arbitman v. Woodside,* 258 Fed. 441, 442 (C. C. A. 4, 1919), we find:

"The rule is established that the action of such executive boards (draft boards) within the scope of their authority is final, and not subject to judicial

review, when the investigation has been fair and the finding supported by substantial evidence; but upon proof that the investigation has not been fair, or that the board has abused its discretion by a finding contrary to all the substantial evidence, relief should be given by the courts under the writ of *habeas corpus.*"

III.

It Is the Accepted Administrative Law Rule That, as a Defense to a Criminal Prosecution for Violation of an Order of an Administrative Board, the Validity of the Board's Order May Be Challenged, Particularly Where the Board Has Offended the Rudimentary Demands of Justice Incorporated in the Concept "Due Process."

(1) The United States Supreme Court Cases.

The particular question involved in this appeal has not been directly passed upon by the Supreme Court. That Court, however, has on at least four occasions intimated its views on the problem, two of the cases being criminal prosecutions for violations of administrative orders.

Thus, *Union Bridge Co. v. United States,* 204 U. S. 364, was a criminal prosecution against a bridge company for its failure to obey the order of the Secretary of War to remove an obstruction to navigation by making higher a bridge. This order of the Secretary of War was made pursuant to the power vested in him by Section 18 of the Act of March 3, 1899 (30 Stat. at L. 1121, 1153). The Secretary gave notice, conducted hearings, considered the evidence, and then made his order. Upon the company's failure to comply, the United States Attorney in the district was notified and a criminal prosecution was insti-

tuted. (Note the similarity in procedure to that under the Selective Training and Service Act.) In deciding that the Act did not improperly delegate authority to the Secretary of War, the Court pointed out that the Act did not give the Secretary arbitrary power but only the power to act reasonably. Said the Court significantly:

> ". . . Nor is there any reason to say that the Secretary of War was not entirely justified, if not compelled, by the evidence in finding that the bridge in question was an unreasonable obstruction to commerce and navigation as now conducted." (p. 307.)

Again in *Monongahela Bridge Co. v. United States,* 216 U. S. 177 (1910), the same objections were raised as in the *Union Bridge Company* case. The Court decided similarly, observing:

> "It does not appear that the Secretary disregarded the facts, or that he acted in an arbitrary manner, or that he pursued any method not contemplated by Congress."

And, accordingly upheld the conviction.

Thus the Court observed that arbitrariness on the part of the Secretary of War was a proper matter of defense.

Looking into the future, when counsel suggested extreme cases of arbitrariness, the Court commented, at page 195:

> "It will be time enough to deal with such cases as and when they arise. Suffice it to say that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual per-

sons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property."

It can thus be seen from the above, although *dicta,* that the Supreme Court was of the opinion that if it were shown that the action of the administrative officer were arbitrary, such evidence would be considered by the Court *in a criminal prosecution,** in determining whether the defendant's constitutional rights had been abridged.

In two other cases involving enforcement of administrative determinations, although not criminal prosecutions, the Supreme Court has indicated that administrative arbitrariness is a defense to enforcement proceedings.

In *Hagar v. Reclamation District No. 108,* 111 U. S. 701 (1834), the Court said:

". . . The assessment under consideration could, by the law of California, be enforced only by legal proceedings, and *in them any defense going either to its validity or amount could be pleaded.*"

Again in *Bradley v. City of Richmond,* 227 U. S. 477 (1913), another administrative enforcement action, the Court commented:

". . . Obviously the burden was upon the plaintiff in error to show an illegal and capricious classification."

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*All italics ours.

(2) State Courts Have Directly Ruled That Such a Defense Is Available.

The highest courts of several states have ruled that proper administrative law principles direct the availability of the defense.

(a) New York.

Fire Department of New York v. Gilmour, 149 N. Y. 453, 44 N. E. 177, was an action to enforce a penalty for violation of an order of the fire department of the City of New York, requiring removal of dangerous and combustible material. The trial court excluded evidence as to the propriety and reasonableness of the order on the ground that such matter was not a proper defense to the action. In reversing the trial court, the New York Court of Appeals said:

> ". . . The justice refused to hear the evidence, saying, 'The question before the court is, has there been a refusal to comply with the order of the board? The court regrets that it can't go into the question whether the order was necessary or whether the department acted properly.'
>
> "We think the justice erred in the principle upon which he proceeded.
>
> ". . . where the legislature . . . invests a subordinate body with the power to investigate and determine the fact whether in any special case any use is made of property for purposes of storage, dangerous on account of its liability to originate or extend a conflagration . . . then we are of the opinion that in such cases the reasonableness of the determination of the board or of the order prohibiting a particular use in accordance with such determination, is open to contestation by the party affected

thereby, and that he is entitled, when sued for disobedience of the order, to show that it was unreasonable, unnecessary and oppressive."

McLean v. Jephson, 123 N. Y. 142, 25 N. E. 409; and *Board of Health v. Heister, 37* N. Y. 661 (1868), are in accord.

(b) Massachusetts.

The highest court of the State of Massachusetts, in *Stevens v. Casey,* 228 Mass. 368, 117 N. E. 528, spoke on the problem in the following language:

". . . Doubtless if the landowner had not sought a review by the Superior Court of the action of the inspector in accordance with the terms of the statute, he would have a right to a trial by jury as to the existence of the fundamental facts upon which the jurisdiction of the inspector rested, *when a criminal prosecution* or proceeding in equity were instituted against him for failure to comply with the requirements imposed by the inspector."

(c) Illinois.

In *People v. McCoy,* 125 Ill. 289, 17 N. E. 786 (1888), the defendant was an M. D. and continued to practice medicine after the state board of health had taken his license away. This action was a criminal prosecution for practicing medicine without a license. In ruling that the administrative order was invalid because it was not supported by the evidence, the Court declared:

"The board cannot from mere caprice, or without cause, revoke a certificate fairly issued upon sufficient evidence of the applicant's qualifications."

(3) The English Rule Is in Accord.

In *Waye v. Thompson,* L. R. 15 Q. B. 342 (1885), the law in question provided that the inspector of meats had the power to determine that meat was unfit. If he made such a determination, he brought the meat before a magistrate who heard the inspector. If the magistrate was satisfied that the meat was unfit for human consumption. he ordered it destroyed and the owner of the meat was thereupon subject to imprisonment. This is a proceeding on an order to show cause as to why the defendant should not be put in jail. The lower court permitted evidence as to the condition of the meat at the time it was condemned; was satisfied that the meat was not unwholesome and gave judgment to the defendant with costs. On appeal the plaintiff-appellant argued that the Court of Petty Sessions (the trial court) was not a court of appeal to review the decision that the meat was bad; in the criminal proceeding the owner could show that the meat had not been exposed for sale or that it was not intended as food for man, but the decision that the meat was unfit for human use was final and conclusive. The Court of Queen's Bench overruled the plaintiff's argument and upheld the decision of the lower court in permitting the evidence in.

(4) Text Writers Are in Accord.

In his exhaustive article, *"Statutory Roads to Review of Federal Administrative Orders,"* appearing in 28 California Law Review 129, 163, Mr. Beck P. McAllister says:

> ". . . If no form of statutory *judicial* review is available there is every reason to say that review should be had in the criminal court. . . ."

See also article by United States District Judge R. C. Bell, American Bar Association Journal, March, 1942, page 164.

Conclusion.

Involved in this appeal, is the recurring issue of religious liberty asserted by one of Jehovah's Witnesses. It must be remembered that the Supreme Court in recent years has extended and restored to its "high constitutional position, the liberties of itinerant evangelists"[1] of which the appellant is one; that freedom of religion is in a "preferred position."[2]

We are dealing here with one of the freedoms which is "the matrix, the indispensable condition of nearly every other form of freedom."[3]

Respectfully submitted,

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Attorney for Appellant.

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[1]Justice Douglas speaking for the Court in *Murdock v. Pennsylvania*, 87 L. Ed. (Adv. Op.) 827, at 834.

[2]Justice Douglas, *supra*, at page 833.

[3]Justice Cardozo, in *Palko v. Connecticut*, 302 U. S. 219.